Supreme Court, U.S.
FILED
OCT 21 1999
OFFICE OF THE CLERK

No. 99-476

In The

Supreme Court of the United States

VALENCE TECHNOLOGY, INC., CARL E. BERG, LEV M. DAWSON, CALVIN L. REED and DALE R. SCHACKLE,

Petitioners,

vs.

JAMES I. BARRY, JAMES VARANO, GREGG M. WEISS, PETER GARUCCIO, M.D., P.C. PENSION PLAN, FREDERICK JEWETT, MILBURNE E. ESTES, JOSEPH P. YONKE, INVESTAR PARTNERSHIP, EUGENE HONEYMAN, ANNE KANTOR, MURRAY GOLDSMITH, MORTON SURKIN, FLORENCE SURKIN, ROBERT LEIMSIDER and GILBERT BERGELSON, On Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

MILBERG WEISS BERSHAD HYNES & LERACH LLP
LEONARD B. SIMON
(*Counsel of Record*)
JOSEPH D. DALEY
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

BERMAN, DEVALERIO, PEASE & TABACCO, P.C.
JOSEPH J. TABACCO, JR.
425 California Street
Suite 2025
San Francisco, CA 94104
Telephone: 415/433-3200

Attorneys for Respondents

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Should this Court review the Ninth Circuit's fact-bound holding that, whatever standard governs Securities Exchange Act §9(e)'s limitations period – "actual discovery" or "inquiry notice" – Defendants failed to demonstrate as a matter of law that the facts in this case placed every reasonable investor on notice of fraud more than a year before suit was filed?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

I. INTRODUCTION..... 1

II. STATEMENT OF THE CASE..... 1

III. REASONS FOR DENYING THE PETITION .. 4

A. The Decision Below Produces No Conflict Among the Circuits..... 4

B. Defendants' Disputes with the Ninth Circuit's Holding Are Factual in Character.. 7

IV. CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Berry v. Valence Tech., Inc., 175 F.3d 699 (9th Cir. 1999) 3

Brown v. Texas, 522 U.S. 940, 118 S. Ct. 355 (1997) 7

Dick v. New York Life Ins. Co., 359 U.S. 437 (1959) 10

Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson, 501 U.S. 350 (1991) 1, 4

Law v. Medco Research, 113 F.3d 781 (7th Cir. 1997) ... 5, 6

Lee v. Sandberg, 136 F.3d 94 (2d Cir. 1997) 7

Marks v. CDW Computer Centers, 122 F.3d 363 (7th Cir. 1997) 6

Sterlin v. Biomune Sys., Inc., 154 F.3d 1191 (10th Cir. 1998) 1, 5, 6

United States v. Kubrick, 444 U.S. 111 (1979) 8

Vargas v. Cummings, 149 F.3d 29 (1st Cir. 1998) 7

STATUTES

15 U.S.C. § 78i(e) 1, 4, 8

15 U.S.C. § 78j(b) 1, 4

RULE

Federal Rule of Civil Procedure 8(c) 7

MISCELLANEOUS

S. Estriecher & J. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. Rev. 681 (1984) 7

R. Posner, *The Federal Courts: Crisis and Reform* (1985) 7

I. INTRODUCTION

Defendants' petition asks this Court to review questions that the Ninth Circuit declined to reach because they do not affect the result, in order to resolve a conflict among the circuits that does not in fact exist.

The Ninth Circuit expressly declined to reach the question whether "actual discovery" or "inquiry notice" triggers the running of the statute of limitations of Securities Exchange Act § 9(e), made applicable to § 10(b) claims by this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991). All seven courts of appeal that have decided the question the Ninth Circuit avoided ***are in agreement***. Petition at 8.

The subtle differences among them, if any, may lie in their descriptions of the "inquiry notice" standard. Defendants ask this Court to review what amount to trivial differences in ***semantics***. *See, e.g., Sterlin v. Biomune Sys., Inc.*, 154 F.3d 1191, 1200 n.15 (10th Cir. 1998) (surveying the circuits, and concluding that the differences among them are likely "more semantic than substantive").

Defendants simply disagree with the Ninth Circuit's holding that, no matter what the proper legal standard is, they failed to demonstrate as a matter of law that the statute of limitations ran. Review is not warranted for Defendants to re-argue the facts.

II. STATEMENT OF THE CASE

This case is a securities fraud class action brought on behalf of all persons who purchased stock in Valence

Technology, Inc. between May 7, 1992 and August 10, 1994. Plaintiffs alleged that the Company and various individual defendants (collectively, "Defendants") violated federal securities laws by making false and misleading statements about Valence's battery technology.

The Company raised over $115 million in two 1992 public offerings to develop a revolutionary lithium-battery technology. A.4.[1]

In December 1992, Valence publicized a $100 million contract with Motorola, which would use Valence's batteries in its cell phones. *Id.*

On February 15, 1993, *Forbes* magazine published an unflattering article about Valence entitled "Story Stock," that questioned investors' enthusiasm for Valence. A.4-5, A.13. The article noted that several Valence insiders had sold some stock, and that Carl Berg, Valence's largest shareholder, had been involved in two other companies that failed. *Id.* The article also mentioned that Berg had once been accused of fraud in an unrelated civil case that settled. Petition at 4.

Still, the article admitted that the Valence battery " 'works beautifully in the lab.' " *Id.* Its main criticism was that no one – not even *Forbes* – could say for certain whether the batteries could be made commercially: " ***'The world doesn't know.'*** " *Id.* Tellingly, Defendants omit these crucial facts from their Statement of the Case. *See* Petition at 4.

---

[1] "A.___" refers to the Appendix to Petition for a Writ of Certiorari.

If the *Forbes* article revealed fraud, no one noticed. In the week after the article was published, Valence's stock dipped only slightly from the $15 mark. A.6. Within days it rose back to $15, and thereafter fluctuated between $17.75 and $11.50 from early March into September when, by month's end, it traded at $20. *Id.* National financial media like *The Wall Street Journal* ran positive stories about Valence. A.6, A.15. Valence successfully completed yet another public offering, this time raising $51.5 million in December 1993. A.6.

Suddenly, on May 3, 1994, Valence announced that it could not meet Motorola's specifications. A.6-7. The market responded immediately, dropping Valence's stock price from $9.50 to $5.25. A.7. When Valence announced on June 16, 1994 that it could not meet Hewlett-Packard's specifications either, Valence's stock price nearly halved itself again, plummeting to $3.813. *Id.* Finally, on August 9, 1994, Valence announced that it was abandoning its "revolutionary" new battery technology altogether. *Id.*

Valence investors filed suit, alleging that Valence's claims about its battery had been false. *Id.* Defendants moved for summary judgment, arguing that investors should have filed suit one year after being put on "inquiry notice" of fraud by *Forbes* in mid-February 1993. Petition at 4-5; A.7. The district court agreed, holding plaintiffs' securities claims time-barred. A.7-8.

The Ninth Circuit reversed, holding that Defendants had not demonstrated as a matter of law that reasonable investors knew or should have known, upon publication of the *Forbes* article, that Valence was a fraud. *See Berry v. Valence Tech., Inc.*, 175 F.3d 699 (9th Cir. 1999), *reprinted at*

A.1-18. The Ninth Circuit explained that, on the factual record presented, it ***did not have to decide*** whether "actual discovery" or "inquiry notice" controls § 10(b) claims – because "under either standard," Defendants had not shown that the *Forbes* article's skepticism was enough to " 'excite inquiry' " by reasonable investors. A.12. The *Forbes* article had simply "raised questions . . . that even the article claimed were largely unanswerable." A.13. At bottom, the article only urged "caution before investing." *Id.*

III. REASONS FOR DENYING THE PETITION

A. The Decision Below Produces No Conflict Among the Circuits

Defendants ask this Court to review questions that the Ninth Circuit did not reach or decide, to resolve a supposed "conflict among the circuits" that does not exist.

They assert that, by suggesting that Exchange Act § 9(e)'s text ***might*** require actual discovery rather than inquiry notice, the decision below conflicts with the law of the other circuits. But the Ninth Circuit expressly declined to reach the issue: "In this case, we need not decide whether actual discovery or inquiry notice applies, because ***under either standard*** the *Forbes* article did not trigger the statute of limitations." A.12 (emphasis added). Defendants emphasize that since this Court's opinion in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), every one of the seven circuit courts to decide the issue has held that "inquiry notice" is the appropriate standard. Petition at 8. Why

they think that the Ninth Circuit's refusal to even reach the issue produces a conflict among the circuits, sufficient to merit this Court's attention, is a mystery.

Nor did the Ninth Circuit adopt an inquiry notice standard that is at odds with the law of the other circuits. All the Ninth Circuit said is this: "***If*** we were to adopt inquiry notice, we would agree with the Tenth Circuit's formulation of that standard." A.11 (emphasis added) (*citing Sterlin v. Biomune Sys., Inc.*, 154 F.3d 1191, 1201 (10th Cir. 1998)). The Court explained that in *Sterlin*, the Tenth Circuit had surveyed the precedents and found that they " 'generally apply an inquiry notice standard coupled with some form of reasonable diligence requirement.' " A.11 (*quoting Sterlin*, 154 F.3d at 1199-1200). "In *Sterlin*'s formulation, 'inquiry notice . . . triggers an investor's duty to exercise reasonable diligence and . . . the one-year statute of limitations period begins to run once the investor, in the exercise of reasonable diligence, should have discovered the facts underlying the alleged fraud.' " A.11 (*quoting Sterlin*, 154 F.3d at 1201).

"Were we to apply the *Sterlin* test to this case," the Ninth Circuit observed, "we would face two questions." A.11-12. "First, did the *Forbes* article raise sufficient suspicion of fraud to cause a reasonable investor to investigate the matter further?" A.12. "Second, when should a reasonably diligent investor have discovered the facts underlying the alleged fraudulent activity?" A.12. The Ninth Circuit then proceeded to apply standard inquiry-notice analysis, drawn from Tenth and Seventh Circuit precedents. *See* A.11-14 & n.8 (*citing Sterlin*, 154 F.3d at 1201-04; *Law v. Medco Research*, 113 F.3d 781, 784-85 (7th Cir. 1997)).

Defendants suggest that the Tenth Circuit's standard in *Sterlin* – that the Ninth Circuit said it might adopt – conflicts with the other circuits' case law. Petition at 8-9. But the supposed conflicts are illusory. *Sterlin* itself surveys the precedents, and concludes that the differences in the circuits' approaches to inquiry notice appear "more semantic than substantive." 154 F.3d at 1200 n.15. What inconsistency there is "may be largely attributable to the fact that in many cases," as here, "the court need not decide exactly when the one-year limitations period began to run, *i.e.*, upon inquiry notice or only when the plaintiff reasonably should have discovered the facts underlying the alleged fraud." *Id.* When the difference matters, the circuit courts have had no difficulty deciding the issue – and their decisions have been consistent. *See, e.g., Sterlin*, 154 F.3d at 1201-02; *Law*, 113 F.3d at 785-86.

Defendants insist that *Sterlin* conflicts with Seventh Circuit law. But *Sterlin* specifically follows Seventh Circuit precedent, noting that "consistent with our holding, a recent case from the Seventh Circuit has recognized that the one-year limitations period should not begin to run until a reasonable investor should have discovered the facts underlying the alleged fraudulent activity." *Sterlin*, 154 F.3d at 1201-02 (*citing Marks v. CDW Computer Centers*, 122 F.3d 363, 367-68 (7th Cir. 1997)). The court acknowledged differences in phraseology, *id.* at 1202 n.19, but pointed out that such differences do not necessarily indicate differences in substance. *Id.* at 1200 n.15.

Review by this Court is hardly needed to iron out minor semantic differences between the circuits' descriptions of inquiry notice. A far better course would be to allow the courts of appeal to continue their fine-tuning of

this standard. *See Brown v. Texas*, 522 U.S. 940, 118 S. Ct. 355, 357 (1997) (Stevens, J.) (writing on denial of certiorari that "the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals 'to serve as laboratories in which the issue receives further study before it is addressed by this Court' ") (citation omitted).[2]

B. Defendants' Disputes with the Ninth Circuit's Holding Are Factual in Character

What Defendants actually seek is to re-argue the factual record, in order to contest the Ninth Circuit's holding that they failed to show as a matter of law that the *Forbes* article placed all reasonable investors on notice of fraud.

The statute of limitations is an affirmative defense, Fed. R. Civ. P. 8(c), that Defendants had the burden of showing as a matter of law to win their motion for summary judgment. *Vargas v. Cummings*, 149 F.3d 29, 35 (1st Cir. 1998); *Lee v. Sandberg*, 136 F.3d 94, 101 (2d Cir. 1997). The Ninth Circuit concluded that the district court had improvidently granted summary judgment. A.12-15.

---

[2] *See also* S. Estriecher & J. Sexton, *A Managerial Theory of the Supreme Court's Responsibilities: An Empirical Study*, 59 N.Y.U.L. Rev. 681, 716 (1984) ("[t]he process of percolation allows a period of exploratory consideration and experimentation by lower courts before the Supreme Court ends the process with a nationally binding rule"); R. Posner, *The Federal Courts: Crisis and Reform* 108 (1985) ("The circuits as well as the states are laboratories.").

The factual record strongly supports the Ninth Circuit's conclusion that Defendants failed to show that reasonable investors were on notice of fraud as a matter of law. The *Forbes* article "made no allegation of actual fraud on the part of Valence or its principals." A.12. It suggested that " 'investors ought to be a little choosier' " before rushing out to buy Valence stock. A.13. There was no "reasonable nexus" between the article's questions about investors' enthusiasm for Valence stock and the nature of the securities fraud action subsequently brought. A.12-13. Section 9(e)'s one-year limitation period is triggered by " 'discovery of the ***facts constituting the violation***,' " 15 U.S.C. § 78i(e), and *Forbes* did not reveal those facts. A.13 (emphasis in original).[3]

---

[3] Defendants also claim that the Ninth Circuit's holding that the *Forbes* article " 'made no allegation of actual fraud' " is erroneous in light of the Court's decision in *United States v. Kubrick*, 444 U.S. 111 (1979), which held that it was error to equate a "plaintiff's ignorance of his legal rights and his ignorance of the fact of his injury or its cause." *Id.* at 122 (cited in Petition at 10). But the Ninth Circuit's holding does no violence to *Kubrick*. To the contrary, *Kubrick* actually ***supports*** the Ninth Circuit's holding.

The plaintiff in *Kubrick*, despite being ***aware*** of the existence and cause of his injury, waited until he was told that the injury might have been caused by medical malpractice before filing suit. 444 U.S. at 114. He should have timely filed suit once he was aware of the "critical facts that he [had] been hurt." *Id.* at 122. Plaintiffs in this case did exactly that – timely filing suit once Valence admitted that it could not, in fact, make the batteries as promised, and fill the Motorola contract. A.7. They were not aware of the "existence and cause" of their injuries earlier merely because an unflattering article admitted that ***no one in the world*** knew if Valence would be able to live up to the hype surrounding its battery technology.

Did Valence's battery work as represented? Could it be manufactured commercially as Valence claimed? *Forbes* admitted: " ***'The world doesn't know.'*** " A.13. It was not until months later, when Valence admitted that it could not fulfill its contract with Motorola because its battery did not meet specifications, that investors had reason to suspect fraud – and thereafter timely filed suit. A.7.

Defendants object that the Ninth Circuit improperly considered "facts extraneous to the facts contained in the article itself" by reviewing stock prices, other articles, and the utter lack of any notable negative response to the *Forbes* article. Petition at 11. This is ironic. Defendants themselves presented the district court and Ninth Circuit with the allegedly "extraneous" facts that they now contend should have been ignored. It was Defendants who claimed that the *Forbes* article ***and its aftermath*** should have spurred reasonable investors to investigate further. They placed the evidence of Valence stock prices in the Record.[4] They led the district court to conclude – erroneously – that the article prompted a 40% stock drop. *See* A.27.

Defendants told the Ninth Circuit that investors, after reading the *Forbes* article, would have found even more fodder for their suspicions in other articles, Securities and Exchange Commission filings, and even ***patent filings***. And yet Defendants now argue that the Ninth Circuit should have looked no further than the bare words on *Forbes'* pages while reviewing what confronted

---

[4] *See* Ninth Circuit Excerpts of Record 435/A.

reasonable investors. This is both illogical and disingenuous – and certainly does not warrant review by certiorari. Defendants' factual arguments are not the sort of questions this Court need concern itself with. "Questions of fact . . . ought not be recanvassed [by this Court] unless they are entangled in the proper determination of constitutional or other important legal issues." *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 454 (1959).

This is simply not the appropriate case to review a question the Ninth Circuit expressly declined to reach. Manufacturing a nonexistent circuit conflict and attempting to re-argue the correctness of the Ninth Circuit's holding regarding the impact the *Forbes* article had on reasonable investors are not the sort of compelling reasons that justify taking up this Court's time.

IV. CONCLUSION

The petition for a writ of certiorari should be denied.

DATED this 21st day of October, 1999.

Respectfully submitted,

MILBERG WEISS BERSHAD HYNES & LERACH LLP
LEONARD B. SIMON
(*Counsel of Record*)
JOSEPH D. DALEY
600 West Broadway
Suite 1800
San Diego, CA 92101
Telephone: 619/231-1058

BERMAN, DEVALERIO, PEASE & TABACCO, P.C.
JOSEPH J. TABACCO, JR.
425 California Street
Suite 2025
San Francisco, CA 94104
Telephone: 415/433-3200

Attorneys for Respondents